(1) Supreme Court, U.S.
FILED
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No. 00-

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
MARTIN A. HOTVET
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 474-8352

* *Counsel of Record*

Attorneys for Petitioner

161049

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

49pp

QUESTIONS PRESENTED

1. Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

2. Whether a prior federal habeas corpus petition, dismissed without prejudice for failure to indicate that the claims it asserts have been exhausted in state court, is "properly filed" under 28 U.S.C. § 2244(d)(2) and therefore tolls the one-year AEDPA statute of limitations during its pendency.

PARTIES TO THE PROCEEDING

Sherman Walker was the petitioner(-appellant) in the courts below and is the respondent in this Court. Christopher Artuz was the respondent(-appellee) in the courts below. George Duncan is substituted for Mr. Artuz, now retired, as the Superintendent of the Great Meadow Correctional Facility in which respondent Walker is now imprisoned. Mr. Duncan is the petitioner in this Court.

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OPINIONS BELOW

The opinion of the Second Circuit, reported at 208 F.3d 357 (2d Cir. 2000), is set forth in Appendix A. The unreported Memorandum and Order of the district court dated May 6, 1998 is set forth in Appendix B. The unreported Memorandum and Order of the district court dated July 9, 1996 is set forth in Appendix C.

STATEMENT OF JURISDICTION

The order of the Court of Appeals was entered on March 27, 2000. The 90-day period for filing a petition for certiorari ended on June 25, 2000. By order dated June 19, 2000, Justice Ginsburg granted an extension of the 90-day period to file a petition to and including July 25, 2000. This petition is filed prior to that date. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISION INVOLVED

The Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), provides in pertinent part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. . . .
>
> (2) The time during which a properly filed application for State post-conviction or other

> collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (Supp. 2000).

STATEMENT OF THE CASE

A. Introduction

Before 1996, there was no statute of limitations for federal habeas corpus proceedings. The only provision dealing with the effect of the passage of time between a state conviction and the filing of a federal habeas corpus petition was Rule 9(a) of the Rules Governing Section 2254 Cases, which permits dismissal of a petition if a State "has been prejudiced in its ability to respond to the petition by delay in its filing." 28 U.S.C. § 2254 Rule 9(a) (1994). The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), P.L. 104-132, §§ 101, 106, 110 Stat. 1214, 1217 (1996), introduced 28 U.S.C. § 2244(d) into the law of habeas corpus. That provision establishes a one-year statute of limitations for applications for the writ, running from the date on which the judgment of conviction became final. With respect to convictions that became final prior to AEDPA's effective date of April 24, 1996, all the circuits to address the issue, including the Second Circuit, have established a one-year grace period after the effective date of the statute in which prisoners may apply for the writ. *See Ross v. Artuz*, 150 F.3d 97, 100-101 (2d Cir. 1998) (citing cases).

Section 2244(d)(2) tolls the one-year limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review." The circuits have agreed that the tolling provision of § 2244(d)(2) applies to the one-year grace period as well as to the one-year

limitations period. *See Bennett v. Artuz*, 199 F.3d 116, 119 (2d Cir. 1999) (citing cases), *cert. granted sub nom, Artuz v. Bennett*, 120 S. Ct. 1669 (2000) (No. 99-1238).

The questions presented in this petition involve the construction of the tolling provision applicable to the one-year AEDPA limitations and grace periods: can prior federal habeas corpus petitions toll the limitations and grace periods during their pendency, and if so, what is the meaning of the "properly filed" requirement as applied to such prior federal petitions so as to invoke the toll?

B. Facts and Procedural History

Respondent Sherman Walker was convicted and sentenced for three distinct acts of and indictments for robbery. He initially was sentenced on February 13, 1992, following his conviction of two counts of robbery after a jury trial in the New York Supreme Court, New York County. The judgment was affirmed by New York State Supreme Court's Appellate Division, First Department. *See People v. Walker*, 632 N.Y.S.2d 68 (N.Y. App. Div.), *leave to appeal denied*, 641 N.Y.S.2d 238 (N.Y. 1995). Thereafter, on February 27, 1992, after a jury trial in the Supreme Court, Queens County, Walker was sentenced following another conviction for robbery. This judgment similarly was affirmed by the Appellate Division, Second Department. *See People v. Walker*, 628 N.Y.S.2d 951 (N.Y. App. Div. 1995), *appeal dismissed*, 641 N.Y.S.2d 608 (N.Y. 1996). Finally, on June 16, 1992, pursuant to a plea of guilty in the Supreme Court, Queens County, Walker again was convicted of robbery and sentenced. This judgment was likewise affirmed by the Appellate Division, Second Department. *See People v. Walker*, 628 N.Y.S.2d 950 (N.Y. App. Div. 1995), *appeal dismissed*, 641 N.Y.S.2d 608 (N.Y. 1996).

Walker filed an application for a writ of error coram nobis with respect to the latter two convictions in the Appellate Division, Second Department, which determined against him on March 18, 1996. *See People v. Walker*, 639 N.Y.S.2d 932 (N.Y. App. Div. 1996). Thereafter, in a single document dated April 10, 1996, Walker filed a complaint pursuant to 42 U.S.C. § 1983 and a petition for habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of New York. He claimed that his detention for each of his three robbery convictions was attributable to a violation of his federal constitutional right to the effective assistance of counsel. The district court dismissed the petition and civil rights complaint without prejudice in a Memorandum and Order dated July 9, 1996 (Appendix C). The court dismissed the habeas corpus petition "for [Walker's] failure to adequately set forth his claim * * * *. Because this court cannot determine which issues have been properly exhausted in State court, the essential allegations of a habeas corpus action have not been presented." (App. C, 20a).

On May 20, 1997, Walker filed a second habeas corpus petition in the district court for the Eastern District of New York. The petition challenged only the third conviction, dated June 16, 1992, claiming that Walker's right to counsel had been denied at the lineup and that the People had failed timely to provide a copy of the detective's affidavit attesting to the circumstances warranting petitioner's inclusion in the lineup. (App. C, 20a).

On August 22, 1997, petitioner herein moved to dismiss Walker's petition as untimely under the one-year limitations period fixed by 28 U.S.C. § 2244(d). The basis of the motion was that more than one year had elapsed since Walker's state-court conviction had become final on January 5, 1996, when the Court of Appeals denied leave to appeal in *People v. Walker*, 641 N.Y.S.2d 608 (N.Y. 1996).

The district court dismissed the second petition as time-barred in a Memorandum and Order dated May 6, 1998 (Appendix B). The court applied the then-applicable rule of the Second Circuit, *see Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997), that petitions challenging convictions which became final prior to AEDPA must be filed within a "reasonable time" after AEDPA's effective date of April 24, 1996.[1] The district court held that the petition was not filed within a reasonable time because it was not filed until "over one year and four months after the completion of [Walker's] direct appeal, over one year after the effective date of AEDPA, and almost one year after his first habeas petition was dismissed." (App. B, 15a).

By order entered December 1, 1998, the Second Circuit granted petitioner a certificate of appealability. *See* 28 U.S.C. § 2253(c) (1996). The parties were ordered to brief the following issues:

> 1. Whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2), and 2. Whether the limitations period in section 2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998).

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1. Shortly after the district court's decision, the Second Circuit in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998) adopted the one-year grace period for habeas corpus petitions challenging pre-AEDPA convictions, running from the April 24, 1996 effective date of AEDPA.

The court further ordered that counsel be appointed to represent the petitioner-appellant. In briefing the first issue, the parties addressed whether federal habeas corpus petitions are "applications for State post-conviction or other collateral review" as stated by § 2244(d)(2).

In an opinion dated March 27, 2000, the Second Circuit reversed the district court (Appendix A). It concluded that a federal habeas corpus petition is an "application for State post-conviction or other collateral review" under § 2244(d)(2). Therefore, the court held, Walker's second petition was timely because the one-year grace period was tolled during the three-month pendency of his initial federal habeas petition. In finding that the tolling provision encompasses federal habeas corpus petitions, the court reasoned that

> "State" modifies only the word "post-conviction," and the phrase "other collateral" is to be given its naturally broader meaning. The disjunctive "or" in the statute creates a distinct break between the two kinds of review [whereas] applying "State" to both of the disjunctive phrases would create a linguistic oddity * * * * "State other collateral review" is an ungainly construction that we do not believe Congress intended.

208 F.3d at 360. Moreover, the Second Circuit added, " " 'State post-conviction review' means all collateral review of a conviction provided by a state and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions." *Id.* at 360.

The Second Circuit also concluded that including federal habeas petitions within the scope of § 2244(d)(2)'s tolling provision would not be inconsistent with the overall objective of AEDPA to place finite restrictions on the time for such

petitions. In the court's view, tolling the limitation period during the pendency of a first federal petition would not create a loophole permitting easy evasion of the limitations period, because successive petitions would not satisfy the "properly filed" proviso of the statute if the first petition had been dismissed on the merits or with prejudice. *Id.* Instead, according to the court, including federal habeas corpus petitions within the scope of § 2244(d)(2) will reward petitioners for filing as soon as possible, thus promoting the statutory objective of efficiency in the review process. *See id.* at 360-361.

REASONS FOR GRANTING THE WRIT

I. There is a conflict among the lower federal courts on the significant question whether the AEDPA tolling provision encompasses federal habeas corpus petitions.

This Court should grant certiorari to resolve the division among the federal courts over whether the phrase "State post-conviction or other collateral review" in AEDPA's tolling provision encompasses federal habeas corpus review. The decisions are squarely in conflict on this important issue. In the present case, the Second Circuit held that "State" does not modify the term "other collateral review" in the language of the statutory provision. Thus, the court reasoned, a prior federal habeas corpus petition falls within § 2244(d)(2), and serves to toll the one-year grace period for convictions preceding AEDPA's effective date (as well, therefore, as the one-year limitations period for post-enactment convictions). As the court below acknowledged, *see* 208 F.3d at 359, its decision squarely conflicts with the decision of the Third Circuit in *Jones v. Morton*, 195 F.3d 153 (3d Cir. 1999). The Third Circuit in *Jones* concluded that "Congress clearly intended that the word 'State' would be read to modify both 'post-conviction' and 'other collateral,' so that tolling would be afforded under § 2244(d)(2) for various forms of state review only." *Id.* at 159.

The conflict between the present case and *Jones* extends beyond the results reached by the two courts to the particulars of their reasoning. The Second Circuit stated it was reading the provision in question "naturally." 208 F.3d at 359. The Third Circuit was persuaded that its own opposite interpretation was the " 'natural reading of the statute.' " 195 F.3d at 158 (quoting *Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998)). The Second Circuit stated that "including federal petitions within the meaning of Section 2244(d)(2) . . . promot[es] the statutory objective of efficiency in the review of State criminal judgments." 208 F.3d at 360-61. The Third Circuit, by contrast, found "nothing in the policy concerns behind AEDPA's enactment" to suggest that the "collateral review" of § 2244(d)(2) encompasses federal habeas corpus petitions. *Jones*, 195 F.3d at 159.

Other circuits also have taken a view of § 2244(d)(2) that inescapably conflicts with that of the Second Circuit. For example, in *Rhine v. Boone*, 182 F.3d 1153 (10th Cir. 1999), the Tenth Circuit considered whether the one-year grace period under § 2244(d)(2) was tolled during the pendency of a petition filed with this Court for a writ of certiorari to review a state court's denial of post-conviction relief. The court held it was not tolled, concluding that "in the wording of § 2244(d)(2), 'State' modifies the phrase 'post-conviction review' and the phrase 'other collateral review,' " and a petition for certiorari "is simply not an application for state review of any kind." *Id.* at 1156; *see also Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999) (following *Rhine* in concluding that petition for writ of certiorari in state-court post-conviction proceeding "is not an application for 'State' review that would toll the limitations period").

The conflict among the circuit courts is mirrored by conflicting decisions of the federal district courts of California, which (like the Second Circuit and Third Circuit in *Walker* and *Jones*, respectively) have reached opposite conclusions while invoking the same principles of statutory construction. *Compare Barrett v. Yearwood*, 63 F. Supp. 2d 1245, 1250 (E.D. Cal. 1999) ("[t]he plain meaning of § 2244(d)(2) is that the statute of limitations is tolled during the pendency of any properly filed federal habeas corpus petition"), *with Sperling v. White*, 30 F. Supp. 2d 1246, 1250 (C.D. Cal. 1998) ("[a] natural reading of the statute concludes that section 2244(d)(2) does not contemplate tolling limitations during the time a habeas petition is pending in federal court").

Nor does the conflict between the present decision and those of the Third, Fifth and Tenth Circuits pertain only to convictions that became final prior to the effective date of AEDPA and to which the judicially-created "grace period" applies. As *Rhine* and *Barrett* — both of which deal with state convictions finalized after April 24, 1996 — make clear, tolling pursuant to § 2244(d)(2) applies — indeed, more literally — to the one-year statute of limitations for habeas corpus petitions with respect to such post-AEDPA convictions. Pre-AEDPA convictions receive the benefit of the one-year "grace period" pursuant to judicial rule, while later convictions are subject to a one-year limitations period mandated by statute. Both periods are tolled during the pendency of "State post-conviction or other collateral review." The interpretation of § 2244(d)(2) arrived at in one context applies equally in the other.

The importance of the issue presented here is indicated by the number of cases potentially affected by its resolution. There were 20,251 habeas corpus proceedings commenced in the federal courts during the year ending September 30, 1999. *See* 1999 Director's Ann. Rep., Jud. Bus. of the U.S.

Cts 146. The number was in the same range for the preceding years — 20,897 in 1998 and 21,621 in 1997. *See id.* Exhaustion of state remedies is required before any of these petitions may be entertained in the federal courts. *See* 28 U.S.C. § 2254(b)(1)(A), (c) (Supp. 2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Studies have suggested that a significant number of such federal petitions are dismissed for failure to exhaust. *See* Richard H. Fallon, *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System*, 162 (4th ed. Supp. 1999) (citing Allen, Schachman & Wilson, *Federal Habeas Corpus and its Reform: An Empirical Analysis*, 13 Rutgers L.J. 675, 695, 703 (1982); Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 Harv. L. Rev. 321, 356-61 (1973)). Thus, the issue of the tolling effect of an initial federal habeas corpus petition on the timeliness of a subsequent petition "may not be uncommon." *Kethley v. Berge*, 14 F. Supp. 2d 1077, 1079 (E.D. Wis. 1998). It will arise whenever an inmate files a habeas petition after his prior petition containing unexhausted claims has languished in the district court before dismissal, or when the original unexhausted petition was filed with only a short time remaining in the one-year limitations period. *See* 1 James S. Liebman and Randy Hertz, *Fed. Hab. Corp. Prac. & Procedure* § 5.16 at 229-231 (3d ed. 1998) (discussing circumstances in which second petition will be time-barred).

Thus, there is an inescapable conflict among the federal courts over the interpretation of § 2244(d)(2). Resolution of the issue will produce a rule of decision applicable in many cases, and perhaps dispositive on the significant matter of a state prisoner's access to federal habeas corpus review. The issue is, moreover, binary in its possible resolutions: the statute either does or does not encompass federal habeas corpus petitions within "other collateral review." Both possible views have now been taken by the circuit courts, with no chance that a middle way or a different approach

will emerge from further lower-court consideration. Only a decision by this Court can produce a consistent statutory interpretation on this important and recurrent issue.

II. The Decision Below Is Legally Erroneous.

The court below erred in interpreting § 2244(d)(2), misapprehending both its literal terms and the provision's connection with other sections of AEDPA.

The Second Circuit first erred in concluding that its reading of the statute is more "natural" than that of the courts with which it disagrees. It is true that the disputed phrase of § 2244(d)(2) — "State post-conviction or other collateral review" — should be given its "most natural reading." *McNeil v. United States*, 508 U.S. 106, 112 (1993). That reading requires that the words of the phrase be read in order and together rather than uncoupled from each other, as the Second Circuit attempted. In the language at issue "[t]here is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378 (1933).

The Second Circuit stated that "[t]he disjunctive 'or' in the statute creates a 'distinct break' between the two kinds of review." 208 F.3d at 359. In fact, the grammatical incompleteness of the first half of the phrase renders the break less than "distinct." To the court below,

> applying "State" to both disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post-conviction * * * review" or "State * * * other review." "State other *collateral* review" is an ungainly construction that we do not believe Congress intended.

Id. at 359-360. It is the Second Circuit's reading, however, that is unnatural, for it disturbs the unity of the phrase's structure.

If Congress had wanted to create a complete disjunction between the two halves of the phrase "State post-conviction or other collateral review," it would have achieved grammatical closure by inserting the word "review" after "post-conviction" in the first half of the phrase. The word "review," however, appears only once, at the end of the phrase. The most "natural" reading of the statute is that Congress intended the entire phrase as a single unit, with "State" modifying the only noun in the phrase — "review" — at the point at which the noun appears.

As the Second Circuit acknowledged, its own interpretation effectively inserts the word "review" before "or." *See* 208 F.3d at 360. Congress easily could have drafted such a statute, but it did not, and its failure to do so means that the interpretation that such a statute would have demanded must be rejected. *See, e.g., West v. Gibson*, 527 U.S. 212, 220 (1999) (rejecting an interpretation that Congress "could easily" have embodied in the plain language of a statute).

That the reading of the statute offered herein is the natural reading is suggested by the failure of scholars to see even a possible disagreement here. Pertinent treatises state unequivocally that section 2244(d)(2) contemplates only state-court proceedings. *See* Larry W. Yackle, *Postconviction Remedies* 346 (1st ed. Supp. 2000); Richard H. Fallon, *et al., Hart and Wechsler's The Federal Courts and the Federal System* 162 (4th ed. Supp. 1999); 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* 229-30 (3d ed. 1998).

Comparison to AEDPA provisions further demonstrates that Congress meant to confine the "review" contemplated by § 2244(d)(2) to state-court proceedings. 28 U.S.C. § 2263(b) (Supp. 2000), for example, parallels § 2244(d)(2) in tolling the 180-day statute of limitations fixed by

§ 2263(b)(1) for habeas corpus proceedings in capital cases. Section 2263(b)(2) provides for tolling "from the date on which the first petition for post-conviction review or other collateral relief is filed until the final state court disposition of such petition." By providing for tolling only until the final *state*-court disposition, Congress made clear that only state "post-conviction * * * or other collateral" proceedings are contemplated by this provision. The identical words appearing in 2244(d)(2) should receive the same interpretation, for it is a " 'normal rule of statutory construction that " 'identical words used in different parts of the same act are intended to have the same meaning.' " ' " *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted); *see also Rhine v. Boone*, 182 F.3d at 1156 (limiting § 2244(d)(2) to state-court post-conviction review); *Ott v. Johnson*, 192 F.3d at 513 (same).

Moreover, when Congress intended in other provisions of AEDPA to refer to both state and federal post-conviction proceedings, it did so unambiguously. Thus, 28 U.S.C. § 2254(i) (Supp. 2000) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2261(e) (Supp. 2000) makes the identical limitation in capital cases, providing that "[t]he ineffectiveness or incompetence of counsel during State or Federal post-conviction proceedings in a capital case shall not be a ground for relief," and that "[t]his limitation shall not preclude the appointment of different counsel * * * at any phase of State or Federal post-conviction proceedings." Likewise, 28 U.S.C. § 2264(a)(3) (Supp. 2000) specifies that a district court may only consider a claim not raised in the state courts if, *inter alia*, the claim is "based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State and Federal post-conviction review." Thus, when Congress intended in AEDPA

to refer to both state and federal post-conviction or collateral review, it did so expressly. Had Congress intended § 2244(d)(2) to apply to federal habeas proceedings, it would "have used language more obviously targeted" to the purpose. *Martin v. Hadix*, 527 U.S. 343, 354 (1999).

The natural meaning of the phrase "State post-conviction or other collateral review" confines the "review" in question to "State" proceedings. This reading of § 2244(d)(2) is reflected in the use of both the same and contrasting terms elsewhere in AEDPA. Accordingly, the Second Circuit erred in its interpretation of § 2244(d)(2), and this Court should grant certiorari to correct the legal error.

III. The Interrelationship of the Issues In *Artuz v. Bennett* and the Present Case Suggests That This Court Should Either Grant the Petition or Hold the Petition Until Disposition of *Bennett*.

This Court's grant of certiorari in *Artuz v. Bennett*, 120 S. Ct. 1669 (2000) (No. 99-1238), underscores the importance of the questions presented in this case. Like the present case, *Bennett* requires interpretation of the tolling provision of § 2244(d)(2) and involves a question of when a prisoner's effort to challenge a final state-court conviction tolls the AEDPA statute of limitations. It is possible, moreover, that the Court's interpretation of the statutory provision, purpose, and the specific terms at issue in *Bennett* will prove dispositive for the present case, which involves adjacent statutory language.

At issue in *Bennett* is the meaning of the portion of § 2244(d)(2) requiring that applications for review be "properly filed" in order to toll the statute of limitations. The Second Circuit in *Bennett* held that a state-court application for post-conviction review is "properly filed" merely if it is submitted in accordance with state procedural

requirements, such as those governing the time and place for filing, even if it is subject to a mandatory procedural bar under state law. 199 F.3d at 121-123. The question presented in *Bennett* is whether a "state court post-conviction application [is] 'properly filed' [under § 2244(d)(2)] if it is filed in [a] court that does not have power to hear [the] merits of [the] application." 68 U.S.L.W. 3649 (April 18, 2000).

This Court's determination in *Bennett* of whether and when an application for review of a state-court conviction is "properly filed" will have bearing on the present case. Even if Walker's first federal habeas corpus petition was an application for "collateral review" encompassed by § 2244(d)(2), it also must have been "properly filed" in order to toll the statute of limitations. If, however, a "properly filed" petition is one of which dismissal is not required by federal law, then Walker's petition was arguably not "properly filed," because its dismissal for failure to exhaust state remedies was mandatory as a matter of federal law. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims."). If Walker's first federal petition was not properly filed, the question of whether it is covered by the "other collateral review" portion of § 2244(d)(2) would be entirely academic with respect to this case.

The Second Circuit has recognized the connection between the issue presented in *Bennett* and the issue it addressed in the present case. The issue was subsumed within the first question framed by the court in its order granting a certificate of appealability, which predated the decision in *Bennett*: "whether [Walker's] first petition tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2)." Accordingly, the issue whether or nor Walker's first federal habeas petition was "properly filed" was an alternative basis for affirming the district court's dismissal of Walker's present petition.

Moreover, this Court's interpretation of the scope of the "properly filed" requirement and the tolling provision in general necessarily will affect the consequences of including or excluding prior federal petitions within the tolling provision in AEDPA. The text of the Second Circuit's decision in the present case recognizes the connection between the two issues. In rejecting the argument that including federal habeas petitions within the scope of § 2244(d)(2)'s tolling provision would be inconsistent with AEDPA's objective of placing finite restrictions on the time within which habeas petitions may be filed, the court reasoned that

> allowing Walker to exclude the time during which his first federal habeas petition was pending does not create a loophole in the law. The tolling provision by its terms already pertains only to "properly filed application[s]." 28 U.S.C. § 2244(d)(2). Thus, for example, successive petitions arguably would not toll the one-year period.

208 F.3d at 360. In other words, in the Second Circuit's view, a particular interpretation of the term "properly filed" helps justify its statutory interpretation of the "other collateral review" provision. Indeed, the Second Circuit's potentially "saving" interpretation of "properly filed" herein may not be consistent with its own holding in *Bennett*, in which it squarely held that an inquiry into whether a state-court application was "properly filed" entails no examination of the merits of the application.

Central to the Second Circuit's decision in *Bennett* was its view of federal-state comity. In the Second Circuit's view,

> [d]etermining whether a pending state-court motion is procedurally barred under a state law

> . . . is beyond the appropriate role of a federal court in addressing whether a state post-conviction application was "properly filed." It would involve federal courts in making determinations as to the proper outcome of pending state proceedings based on state law when a state court is positioned to make the very same decision.

Bennett, 199 F.3d at 122. The same consideration will not arise in a federal court's determination of whether a federal habeas petition is procedurally barred, for it is not beyond the appropriate role of a federal court to make such an assessment. Indeed, Rule 4 of the Rules Governing Section 2254 Cases contemplates just such a role. Depending on the outcome of *Bennett* and this Court's view of the "other collateral review" provision, this distinction may be critical in applying the "properly filed" requirement to prior federal habeas petitions. The present case offers an opportunity either to resolve the issue or indicate that it need not be resolved.

The issue this Court already has agreed to resolve in *Bennett* thus arises in and has unavoidable implications for the present case. Especially in view of the compelling considerations otherwise warranting review by this Court, the instant petition should be granted so that the entirety of 2244(d)(2) is before the Court in resolving the important question whether the pendency of a federal habeas petition dismissed for nonexhaustion tolls the limitations period. At the very least, the Court should hold the petition pending its decision in *Bennett* for consideration in light of that case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted or held for consideration in light of this Court's decision in *Artuz v. Bennett*, No. 99-1238.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the State of New York
PREETA D. BANSAL*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
MARTIN A. HOTVET
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 474-8352

Attorneys for Petitioner

* *Counsel of Record*

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED MARCH 27, 2000

Sherman WALKER,

Petitioner-Appellant,

v.

Christopher ARTUZ, Superintendent,

Respondent-Appellee.

Docket No. 98-2572

United States Court of Appeals,
Second Circuit.

Argued Sept. 15, 1999

Decided: March 27, 2000

* * *

Before: WALKER, LEVAL, and POOLER, Circuit Judges.

POOLER, Circuit Judge:

Sherman Walker appeals from the May 18, 1998, judgment of the United States District Court for the Eastern District of New York (Sterling Johnson, Jr., *Judge*) dismissing his petition for a writ of habeas corpus.

Appendix A

BACKGROUND

A jury convicted Walker of first-degree robbery in Queens County Supreme Court in June 1992, and the state Appellate Division affirmed the conviction in June 1995. The New York Court of Appeals denied Walker leave to appeal his conviction on January 15, 1996. Walker's conviction therefore became final on April 14, 1996, when his time expired to seek direct review by writ of certiorari to the United States Supreme Court. Walker pursued a state collateral attack on his conviction and petitioned for a writ of error *coram nobis,* which the Appellate Division denied on March 18, 1996. According to appellant, he also filed a separate motion in February 1996 to vacate his conviction in state court, which denied the motion in April 1996.

In a single document dated April 10, 1996, Walker filed in federal court a complaint pursuant to 42 U.S.C. § 1983 and a habeas corpus petition pursuant to 28 U.S.C. § 2254. The district court for the Eastern District of New York dismissed the complaint and petition without prejudice on July 9, 1996, because (1) Walker failed to state a Section 1983 claim against his court-appointed lawyers, who were not state actors; and (2) it was not apparent from the petition what issues Walker had raised in his direct criminal appeals and whether Walker had exhausted his state-court remedies. *See Walker v. Legal Aid Soc'y,* No. 96 CV 2946, 1996 WL 391585, at *1-2 (E.D.N.Y. July 9, 1996). About 11 months later, Walker filed in federal court a second habeas corpus petition dated May 20, 1997. In a memorandum and order dated May 6, 1998, Judge Johnson dismissed the second petition as untimely pursuant to the Antiterrorism and

Effective Death Penalty Act of 1996 ("AEDPA") because Walker filed it more than one year after the effective date of the AEDPA, or April 24, 1996. Judge Johnson also noted that Walker filed his second habeas petition more than one year after completing his direct criminal appeal and nearly one year after the court dismissed his first habeas petition. On December 18, 1998, we granted Walker a certificate of appealability regarding these two issues: first, whether Walker's first habeas petition tolled the one-year statute of limitations, and second, whether equitable tolling applied to make Walker's second habeas petition timely. Because we answer the first question in the affirmative, we need not reach the issue of equitable tolling. Walker's appeal presents questions of law that we review *de novo*.

DISCUSSION

Walker's appeal presents a narrow question regarding proper interpretation of Section 2244's statute of limitations and tolling provisions. At issue is whether the AEDPA's mandate to toll its one-year limitations period during the pendency of "other collateral review" applies to properly filed federal habeas petitions or only to applications for state review. *See* 28 U.S.C. § 2244(d)(2).

In general, the AEDPA restricts the ability of prisoners to seek federal review of their state criminal convictions. Section 2244(d) created a new one-year statute of limitations in which state prisoners could file applications for a writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). The one-year period generally runs from the date on which the state criminal judgment became final. *See id.* Prisoners like

Walker, whose convictions became final prior to the AEDPA's effective date of April 24, 1996, have a one-year grace period in which to file their habeas corpus petitions, or until April 24, 1997. *See Ross v. Artuz,* 150 F.3d 97, 102-03 (2d Cir.1998). Section 2244 also has a tolling provision that applies to both the statute of limitations and the one-year grace period. *See Bennett v. Artuz,* 199 F.3d 116, 119 (2d Cir.1999) (holding that the "AEDPA's pending-state-petition tolling provision does apply to a petition challenging a pre-AEDPA conviction"), *petition for cert. filed,* __ U.S.L.W. __ (U.S. Jan. 24, 2000) (No. 99-1238). The tolling provision at Section 2244(d)(2) states:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d)(2).

Walker interprets Section 2244(d)(2), specifically the phrase "other collateral review," to mean that we should exclude from the one-year grace period the time during which his first, timely habeas corpus petition was pending in federal court. That exclusion of approximately 80 days would render his second habeas petition timely. Respondent interprets the phrase "other collateral review" to mean only state procedures or remedies. Under this view, no tolling takes place and Walker's second habeas petition is untimely because he filed it after the one-year grace period ended on April 24, 1997. Both Walker and respondent claim that their

interpretations rely on the plain language of Section 2244(d)(2) and are consistent with the legislative goals of the AEDPA.

Although a number of federal district courts have addressed this question, only one other circuit court of appeals has decided the issue. In *Jones v. Morton*, the Third Circuit held that Congress "intended that the word 'State' would be read to modify both 'post-conviction' and 'other collateral,' so that tolling would be afforded under § 2244(d)(2) for various forms of state review only." *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir.1999). The Third Circuit relied upon a California federal district court case, *Sperling v. White*, 30 F.Supp.2d 1246, 1250 (C.D.Cal.1998), as well as other district court cases adopting *Sperling*'s interpretation. *See Jones*, 195 F.3d at 158-59. In *Sperling*, the district court adopted the report and recommendation of a magistrate judge holding that Section 2244(d)(2) "does not contemplate tolling limitations during the time a habeas petition is pending in federal court." *Sperling*, 30 F.Supp.2d at 1250. *But see Barrett v. Yearwood*, 63 F.Supp.2d 1245, 1249-50 (E.D.Cal.1999) (reaching opposite result). We respectfully disagree with the *Jones* approach.

It is possible to interpret the word "State" in Section 2244(d)(2) to modify both "post-conviction" and "other collateral." Close analysis of the statute language, however, shows that "State" modifies only the word "post-conviction," and the phrase "other collateral" is to be given its naturally broader meaning. The disjunctive "or" in the statute creates a distinct break between the two kinds of review *Jones* and *Sperling* would tie together. In contrast, applying "State" to

both of the disjunctive phrases would create a linguistic oddity because the statute would refer to "a properly filed application" for "State post-conviction . . . review" or "State . . . other review." "State other *collateral* review" is an ungainly construction that we do not believe Congress intended. If Congress had intended the meaning that the *Sperling* court imputed, it might more naturally have written "a properly filed application for State post-conviction or collateral review." We choose to adopt an interpretation that gives full meaning to the phrase "State post-conviction review," which includes all state remedies, and the phrase "other collateral review," which means federal habeas petitions. As the district court held in *Barrett,* " 'State post-conviction review' means all collateral review of a conviction provided by a state," and the phrase "other collateral review" would be meaningless if it did not refer to federal habeas petitions. *Barrett,* 63 F.Supp.2d at 1250.

In addition, the district court's interpretation in *Sperling* strains to hold that "State post-conviction review" means state judicial remedies and "other collateral review" means non-judicial state remedies such as petitions for clemency filed with the governor. *See Sperling,* 30 F.Supp.2d at 1251. This reading would require us to interpret at least one of these terms differently from its normal usage, because both "collateral review" and "post-conviction review" conventionally refer to habeas corpus, *coram nobis* and similar writs or judicial orders that courts issue after a conviction is final, overturning the conviction by reason of some error of law. *Sperling* read "collateral" to apply to clemency and pardon applications in order to avoid having it refer to the same scope of proceedings as "post-conviction

review" describes, but we can see no logical reason why Congress would have thought those applications to be included in the term "collateral" but not "post-conviction." The only legislative history upon which the *Sperling* decision relies for its equation of "other collateral review" with petitions for clemency is a statement of Senator Orrin Hatch concerning a totally different proposed amendment to the legislation and discussed in the context of capital cases. *See id.* at 1251 (citing 141 Cong. Rec. S7803-01, S7825-26 (June 7, 1995) as "appearing to describe a state petition for clemency as a form of collateral review, but distinct from judicial post-conviction review"). The *Sperling* court's own characterization of the legislative history provides only a slender reed upon which to rest its holding. Because "post-conviction review" is a broad term that seems to encompass all review a prisoner seeks after conviction, we can see no reason why Congress should have believed that there were "other" forms of "collateral review" that did not come within the scope of "post-conviction review."

The *Sperling* court also held that its interpretation was consistent with the overall objective of the AEDPA "to place finite restrictions upon the time within which a petitioner may file a petition in federal court." *Id.* at 1251. However, allowing Walker to exclude the time during which his first federal habeas petition was pending does not create a loophole in the law. The tolling provision by its terms already pertains only to "properly filed application[s]." 28 U.S.C. § 2244(d)(2). Thus, for example, successive petitions arguably would not toll the one-year period. Even if they did, the act's restrictions on successive petitions, *see* 28 U.S.C. § 2244(b), would not allow a petitioner to file

another petition if the district court dismissed a first petition on its merits or with prejudice. We therefore disagree with respondent that our reading would frustrate the AEDPA's purpose by allowing petitioners to indefinitely toll the statute of limitations by filing a series of unexhausted petitions.

Moreover, including federal petitions within the meaning of Section 2244(d)(2) will reward petitioners for filing their federal petitions as soon as possible, thus promoting the statutory objective of efficiency in the review of state criminal judgments. Congress enacted the limitations period to spur defendants to file their federal habeas petitions more quickly, and reading the tolling provision to encompass federal court consideration of the petitions furthers this goal. Under our reading of the statute, defendants will have an incentive to file their federal petitions right away because this filing will toll the one-year statute of limitations. This tolling is particularly useful for a petitioner if, upon review, the federal court determines that he must return to state court to exhaust his claims. Meanwhile, if the claims are properly before the federal court, this incentive leads to speedier completion of collateral review.

We must examine the issue before us in the historical context of the AEDPA. This statute created a one-year statute of limitations where none previously existed. *See Ross,* 150 F.3d at 98. This in itself was a dramatic change in the law and was Congress' primary vehicle for streamlining the habeas review process and lending finality to state convictions. By reading the tolling provision of Section 2244 to include pending federal habeas petitions, we do not detract from the overall purpose of the AEDPA because the statute

of limitations remains enforceable and intact. Our interpretation merely avoids penalizing state prisoners who properly have filed federal habeas petitions and are awaiting a response from the court.

In adopting the contrary position, the Third Circuit did not "dwell" on the issue before it because it believed the majority of courts considering the issue adopted the *Sperling v. White* approach. *See Jones,* 195 F.3d at 158-59. We do not see a consensus emerging. It is true that three other California district court cases are consistent with the *Sperling* decision issued in the Central District of California. *See Harrison v. Galaza,* No. C 98-3371 TEH (PR), 1999 WL 58594, at *2 (N.D.Cal. Feb. 4, 1999); *Vincze v. Hickman,* No. CIV.S-98-044 WBSGGHP, 1999 WL 68330, at *1 (E.D.Cal. Jan. 13, 1999); *Babcock v. Duncan,* No. C 97-2740 VRW (PR), 1997 WL 724450, at *2 (N.D.Cal. Nov. 12, 1997). As noted above, however, we find the analysis of the California minority position in *Barrett* to be more persuasive. *See Barrett,* 63 F.Supp.2d at 1249-50. In addition, one of the district court cases upon which both *Jones* and *Sperling* rely does not clearly support their position. In the Wisconsin case of *Kethley v. Berge,* the district court indeed held that "time is not tolled while an improperly filed *federal* habeas petition is gathering dust on district court shelves" pursuant to Section 2244(d)(2). *See Kethley v. Berge,* 14 F.Supp.2d 1077, 1079 (E.D.Wis.1998). However, the Wisconsin court also recognized the inequity resulting from its interpretation, stating that "the procedural dismissal of petitioner's action in the present case should not later be construed to produce the unintended effect of barring federal habeas review under the AEDPA statute of limitations provision." *Id.* The *Kethley*

court remedied this problem by permitting the petitioner to reopen his petition after exhausting state remedies and preserve his original case number and filing date as "a form of equitable tolling of the AEDPA's limitations period." *Id.* at 1079. Cases purporting to follow *Kethley's* interpretation of Section 2244(d)(2) have not adopted this second part of the solution. Although we agree with the Wisconsin court's assessment of the inequity its interpretation of Section 2244(d)(2) creates, we find its solution to the problem — preserving the original petition's case number and filing date — to be artificial and cumbersome. A much simpler approach is to interpret the words of Section 2244(d)(2) to allow tolling outright in cases such as Walker's.

Because we decide that Section 2244(d)(2) by its terms tolled the one-year period of limitations while Walker's first federal habeas petition was pending, we need not reach his alternative argument that the court should exercise its equitable powers to exclude the approximately 80 days during which the first petition was pending.

CONCLUSION

For the foregoing reasons, we reverse the district court's dismissal, reinstate Walker's petition for *habeas corpus* relief, and remand the matter to the district court for further proceedings.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MAY 6, 1998 AND FILED MAY 13, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 CV 3397 (SJ)

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent of Green Haven Correctional Facility,

Respondent.

MEMORANDUM AND ORDER

* * *

JOHNSON, District Judge:

Sherman Walker ("Petitioner" or "Walker") has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner believes his state court conviction should be reversed because (1) the prosecution failed to provide *Rosario* materials and (2) Petitioner was denied his constitutional right to counsel at the lineup when police deliberately failed to contact his counsel. Respondent

moves to dismiss the petition as time-barred. For the reasons stated below, the petition is dismissed.

BACKGROUND

On June 16, 1992, after pleading guilty, Petitioner was convicted of Robbery in the First Degree (N.Y. Penal Law § 120.10[1]) and sentenced to a prison term of 7 to 14 years. Petitioner appealed his conviction to the New York Supreme Court, Appellate Division, Second Department ("Appellate Division"). On June 12, 1995, the Appellate Division affirmed Petitioner's judgment of conviction. *People v. Walker*, 216 A.D.2d 425 (2d Dept. 1995). On January 5, 1996, the New York State Court of Appeals denied Petitioner further leave to appeal. *People v. Walker*, 87 N.Y. 926 (1996).

Petitioner filed his first habeas corpus petition in June of 1996 in conjunction with a claim pursuant to 42 U.S.C. § 1983. On July 9, 1996, this Court dismissed the petition without prejudice pursuant to 28 U.S.C. § 1915(d) because it was not apparent that Walker had exhausted all of his state remedies. *Walker v. Legal Aid et al.*, 96 CV 2946 (E.D.N.Y. June 9, 1996). On May 20, 1997, Petitioner filed the instant petition.

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1. Rule 4 of the Rules Governing Section 2254 Cases for the United States District Courts permits a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

Appendix B

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[2] which became effective on April 24, 1996, significantly amended 28 U.S.C. §§ 2244, 2253, 2254 and 2255. As a result, 28 U.S.C. § 2244(d)(1) now provides that federal habeas petitions challenging a judgment of a state court are subject to a one-year statute of limitations.[3] The

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2. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

3. 28 U.S.C. § 2244(d)(1) states:

> (1) a 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> >
> > (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly

(Cont'd)

limitation period, with certain exceptions, begins to run either after the completion of direct review of the judgment by the state courts or upon the expiration of the time for seeking such review. *See* 28 U.S.C. § 2244(d)(1). However, Congress did not provide specific guidelines regarding the retroactivity of this provision, thereby leaving the resolution of that issue to the courts. The Court of Appeals of the Second Circuit has held that in cases where, as here, the judgment of conviction became final before the effective date of the AEDPA, the habeas petition may be filed outside the one-year period but within a "reasonable time" after April 24, 1996. *See Peterson v. Demskie*, 107 F.3d 92, 93 (2d Cir. 1997). Yet, it declined to set forth a precise definition of "reasonable time."

In *Peterson*, the court held that the petitioner's filing of his petition seventy-two days after the effective date of the AEDPA was timely. *Id.* at 93. However, the court stated that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," it saw no need to accord a full year after the effective date of the AEDPA. *Id.* at 93. Further, the court cautioned that the reasonable time alternative should not be applied with undue rigor. *Id.*

(Cont'd)

> recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Appendix B

In order to analyze the effect of the AEDPA on the instant case, it is necessary to reiterate the dates of the relevant events. As set forth above, Petitioner's state court conviction became final on January 15, 1996, when Petitioner failed to file an appeal ten days after the New York Court of Appeals decision. Petitioner did not file any collateral motions. Walker's second habeas petition is dated May 20, 1997[4] — over one year and four months after the completion of his direct appeal, over one year after the effective date of the AEDPA, and almost one full year after his first habeas petition was dismissed. Even after being notified that his first habeas petition failed to state a claim, Walker waited almost one year to file his second habeas petition. Thus, the Court finds that Walker's current petition was not filed within a reasonable time as contemplated in *Peterson*. Accordingly, the Court hereby dismisses the petition as time-barred. *See Clark v. Greiner*, 97 CV 2483 (E.D.N.Y. July 10, 1997) (habeas petition dismissed as untimely where it was filed over one and one-half years after conviction became final and eleven months and two and one-half weeks after enactment of the AEDPA); *Smith v. Stinson*, 97 CV 1935 (E.D.N.Y. June 30, 1997) (finding untimely a petition filed more than two years after conviction became final and eleven months and three weeks after enactment of the AEDPA); *Calderon v. Artuz*, 97 CV 1965 (E.D.N.Y. June 25, 1997) (dismissing petition filed eleven months and three weeks after the effective date of the AEDPA and over four and one-half years after the state court judgment as untimely); *DeChirico v. Walker*, 97 CV 1456 (E.D.N.Y. June 12, 1997)

4. Where a prisoner is proceeding *pro se*, he is deemed to have filed his application when it is delivered to prison officials. *Houston v. Lack*, 487 U.S. 266, 273 (1988).

(finding petition filed almost eleven months after the effective date of the AEDPA, and over four years after his judgment of conviction became final was untimely); *Oppenheimer v. Kelly*, 1997 WL 362216 (S.D.N.Y. 1997) (stating that filing 350 days after the effective date of the AEDPA is unreasonable); *Zebrowski v. Keane*, 1997 WL 436820 (N.D.N.Y. 1997) (concluding that petition filed more than three years after judgment of conviction became final and more than one year after the effective date of the AEDPA was not timely); *Berger v. Stinson*, 1997 WL 535227 (W.D.N.Y. 1997) (dismissing petition filed eight days short of a full year after the AEDPA became effective and where the underlying conviction occurred more than a decade ago as time-barred). *But see Rivalta v. Artuz*, 1997 WL 401819 (S.D.N.Y. 1997) (finding a petition filed six months after the effective date of the AEDPA was timely).

Given that the petition is time-barred, the merits of Petitioner's claims shall not be addressed. In addition, this Court declines to issue a certificate of appealability, as Petitioner has not presented a "substantial showing of the denial of a constitutional right." *See Nelson v. Walker*, 121 F.3d 828, 832 n.3 (2d Cir. 1997).

CONCLUSION

For the reasons set forth above, Walker's petition for a writ of habeas corpus is dismissed.

SO ORDERED.

Dated: May 6, 1998
Brooklyn, New York

s/ Sterling Johnson
U.S.D.J.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 9, 1996

Sherman WALKER,

Plaintiff,

v.

The LEGAL AID SOCIETY, Philip Weinstein, Joel Atlas, James Branden, Hillar Wiese, Alden Lewis, Samuel Feldman, and Christopher Artuz, Superintendent of the Green Haven Correctional Facility,

Defendants.

No. 96 CV 2946.

United States District Court,
E.D. New York.

July 09, 1996.

* * *

MEMORANDUM AND ORDER

JOHNSON, District Judge:

Sherman Walker ("plaintiff" or "Walker"), appearing pro se, brings this action pursuant to 42 U.S.C. § 1983 alleging that a number of lawyers associated with the Legal Aid

Society and in private practice violated his right to counsel and due process of the law. Plaintiff also seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. For the reasons stated below, the motion to proceed in forma pauperis is granted, but the complaint is dismissed sua sponte in accordance with 28 U.S.C. § 1915(d).

BACKGROUND

In three separate state court trials — one in New York County, and two in Queens County — Plaintiff was convicted on robbery charges. In each case, the Legal Aid Society was appointed to represent plaintiff in the appeal of his conviction. In the course of representing Walker, however, it became apparent that the Legal Aid Society already represented a confidential informant who had been a primary source of information leading to plaintiff's arrest. Because representing both clients would pose a conflict of interest, the Legal Aid Society formally moved to be relieved as counsel on plaintiff's appeals. The state appellate courts granted this motion and appointed new counsel to prosecute plaintiff's appeals.

Walker now argues that no confidential informant existed and thus that there was no conflict of interest preventing the Legal Aid Society from representing him. Plaintiff contends that, although he notified the Legal Aid Society of this fact, they failed to investigate his claim. Plaintiff argues that the Legal Aid Society's improper withdrawal denied him of his right to the counsel of his choice and due process of the law.

Appendix C

Accompanying plaintiff's complaint was an application to proceed in forma pauperis.

DISCUSSION

Under 28 U.S.C. § 1915, a district court may dismiss a case in which the plaintiff has applied to proceed in forma pauperis "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The Second Circuit follows a two-step approach in establishing eligibility to proceed in forma pauperis by first assessing a plaintiff's financial status, followed by a determination as to the frivolousness of the action. See Anderson v. Coughlin, 700 F.2d 37, 41 (2d Cir.1983).

Applying the two-step approach to the present case, this Court finds that plaintiff satisfies the financial requirements to proceed in forma pauperis. Based on the allegation of poverty stated in his declaration, the Court is convinced that Walker is unable to pay the costs and filing fees in connection with this suit. Thus, plaintiff's motion for leave to proceed in forma pauperis is granted.

Nevertheless, plaintiff's complaint must be dismissed. First, to establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that the conduct complained of was committed by a person acting under the color of state law and that the conduct deprived the plaintiff of a federal right. Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir.1996). The United States Supreme Court has stated unequivocally that court-appointed lawyers do not act under color of state law within the meaning of § 1983. See Polk County v. Dodson,

454 U.S. 312 (1981) (public defender does not act under color of state law); Cassidento v. Hammer, 1995 WL 722536 (2d Cir.1995) (court-appointed attorney does not act under color of state law). As such, plaintiff's claims against all of the individual attorneys as well as the Legal Aid Society must be dismissed. See Pino v. Ryan, 49 F.3d 51 (2d Cir.1995) (sua sponte dismissal may be based on an affirmative defense that appears on the face of the complaint).

Plaintiff's claim for habeas corpus relief also must be dismissed for failure to adequately set forth his claim. For instance, although plaintiff refers to state appellate proceedings relating to his robbery convictions, he fails to specify the claims litigated in those appeals. Because this court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented. See 28 U.S.C. § 2254(b) (writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State"). Therefore, this claim is dismissed without prejudice.

CONCLUSION

For the reasons stated herein, plaintiff's motion to proceed in forma pauperis is granted. However, the Court finds plaintiff's complaint to be frivolous within the meaning of 28 U.S.C. § 1915(d), since it fails to state a cognizable claim under 42 U.S.C. § 1983 or 28 U.S.C. § 2254. Accordingly, plaintiff's complaint is dismissed without prejudice.

SO ORDERED.